Supreme Court, U.S.
FILED
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92-383

No. _____

In The

Supreme Court of the United States

October Term, 1992

GREGORY R. GORRELL,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondents.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. May the executive branch of the United States government, consistent with the rules of lenity and common law meaning as well as with this Court's decisions in *McNally v. United States* and *Carpenter v. United States*, use the mail fraud statute to create a novel basis for criminal liability between joint owners of property in the absence of any indication that Congress intended to impose such liability?

2. May a federal criminal prosecution in a mail fraud case be premised on routine and innocent mailings of business invoices or checks which occur after completion of the scheme to defraud and on which the success of the scheme does not depend?

3. May a federal court of appeals adjudicating a direct criminal appeal decline to address, without comment or elaboration, a nonfrivolous and dispositive issue properly raised and fully briefed by a criminal defendant?

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PETITION FOR WRIT OF CERTIORARI

OPINIONS BELOW

The decisions of the United States Court of Appeals for the Fourth Circuit and of the District Court are unreported. Copies of both decisions are appended to this Petition.

JURISDICTION

The decision of the Court of Appeals was entered on April 30, 1992. Defendant filed a timely Petition for Rehearing with a Suggestion for Rehearing In Banc. That Petition was denied, and judgment was entered by the Court of Appeals on June 10, 1992. The United States Supreme Court

has jurisdiction to review that judgment pursuant to 28 U.S.C. § 1254(1).

STATUTES

18 U.S.C. § 1341

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious coin, obligation, security, or other article, or anything represented to be or intimated or held out to be such counterfeit or spurious article, for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service, or takes or receives therefrom, any such matter or thing or knowingly causes to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined not more than $1,000 or imprisoned not more than five years, or both. If the violation affects a financial institution, such person shall be fined not more than $1,000,000 or imprisoned not more than 30 years, or both.

As amended Aug. 9, 1989, Pub.L. 101-73, Title IX, § 961(i), 103 Stat. 500; Nov. 29, 1990, Pub.L. 101-647, Title XXV, § 2504(h), 104 Stat. 4861.

STATEMENT OF THE CASE

This case raises important issues of statutory construction in the context of federal criminal law. Specifically at issue is the scope of the federal mail fraud statute. The general question is whether the executive branch is bound by the terms of federal criminal law as enacted by Congress or whether the executive branch may alter those terms in novel and creative ways, regardless of statutory language and congressional intent. More specifically, the executive branch's

prosecution of this case runs afoul of the rules of lenity and common law meaning as well as decisions by this Court limiting the scope of the mail fraud statute to activity that both deprives another of property and actually involves the use of the mails. In the view of the government, however, these "old fashioned notions" of statutory construction "have gone by the board and that a new and very rational area of law is developing."[1] This Court may wish to remind the government of the value of those old fashioned virtues under which Congress, and not the executive branch, creates and defines the scope of federal criminal law.

In short, this case is about the need to limit the application of federal criminal laws to those circumstances plainly falling within the realm of activity Congress intended to criminalize. This Court appears to be moving toward a definitive statement on this precise issue. In recent terms, several Justices have voiced strong views indicating that the scope of federal criminal law must be limited to the congressional design. *United States v. Thompson/Center Arms Co.*, 112 S.Ct. 2102 (1992)(plurality and concurring opinions); *Moskal v. United States*, 111 S.Ct. 461 (1990)(dissenting opinion); *Crandon v. United States*, 110 S.Ct. 997 (1990)(majority and concurring opinions). Yet the United States government, in practice, continues to enforce federal criminal law under a theory of broad and almost open-ended construction. This case presents the Court an opportunity to address and resolve that problem.

I. Statement of Facts

Gregory Gorrell was hired in 1974 by Jackson and Kelly, a West Virginia law partnership, as an associate. He became a partner in 1980. Joint Appendix at 136-37. The partners at Jackson and Kelly own the assets of the firm, *id.* at 164, and once Gorrell became a partner in the firm, virtually all money he earned was jointly owned with the other partners. *Id.* at

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[1] Joint Appendix at 33. All citations to the trial record will be to the Joint Appendix prepared for the appeal.

144. As a partner, Gorrell's share of the firm's net profits, including those profits generated by Gorrell's non-client work such as speaking fees, honoraria, etc., was determined solely by the year in which he became a partner. *Id.* at 147. In short, the partners' owned an undivided interest in each partner's work product, and each partner's share of the net profits generated by that work product was determined not by contribution to income, but by the year in which the individual joined the partnership. *Id.* at 148. As John McClaugherty, managing partner, testified, some partners, including Gorrell, felt that a different system of compensation ought to be in place. *Id.* at 162.

The events giving rise to this prosecution occurred between July 1987 and September 1988. During that time, Gorrell was the billing partner in charge of the firm's environmental department, which he had established and developed. *Id.* at 151, 159. As such he was responsible for preparing and approving "billing memos," *i.e.*, internal accounting statements reflecting amounts to be charged clients for legal services and expenses. *Id.* Instead of accurately reporting the number of hours he had worked for his clients, Gorrell under reported those hours and converted the unreported hours into claimed expenses for consulting services rendered by HGA Associates, a fictitious entity. Based on the value of the unreported hours, Gorrell ordered checks from the partnership payable to HGA Associates. *Id.* at 233. The checks, totalling $368,630, were drawn on the firm's master account. *Id.* at 182. These funds, although created solely by virtue of Gorrell's work, were, by virtue of the partnership agreement, partnership assets.

At some time after Gorrell manipulated the partnership's accounting procedures, and after he had obtained checks from the partnership's general account, Gorrell's clients were mailed invoices by a clerk in the employ of the partner. The clients were not, however, billed for the fictitious HGA consulting fees. Instead, each client received a perfectly proper invoice reflecting the actual work performed by Gorrell for that client as well as the proper amount due from that client for legal services rendered. *Id.* at 154-55, 275-77. The sole

purpose and effect of the invoice and its delivery to the client was to cause the client to pay a legitimate fee for services properly rendered. Indeed, in closing argument, the Assistant United States Attorney stated, "Now, as far as we can tell from the evidence in this case, the clients were not defrauded. They were paying the appropriate bill for the work that was done." *Id.* at 457. The only deception occurred within the firm's internal accounting procedures, and that deception was fully consummated prior to the preparation or mailing of any invoice. After receiving the invoices, the clients mailed checks to the partnership. The checks were then deposited to the firm's master account. These post-deception mailings, both to and from the clients, are the mailings relied upon by the government for federal jurisdiction.

Importantly, John McClaugherty, the firm's managing partner, testified that Gorrell's ability to obtain partnership funds was in no way dependent upon the mailings relied on by the government for jurisdiction. As a partner, Gorrell had full access to partnership funds. McClaugherty testified that if a client failed to pay an expense that had been prepaid by the firm (like the HGA checks), the firm would absorb the loss. *Id.* at 181. There would be no recourse against the billing attorney. *Id.* In fact, the government presented absolutely no evidence that Gorrell's plan depended on invoices or checks being transmitted through the mail or otherwise.

II. Proceedings Below

On February 19, 1991, Gregory Gorrell was indicted on ten counts of mail fraud (18 U.S.C. § 1341) and one count of using a fictitious name in applying for a post office box in connection with a mail fraud (18 U.S.C. § 1342).[2]

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[2] Gorrell procured a post office box in the name of HGA Associates. Joint Appendix, at 403. The relevance of the post office box goes solely to

Prior to trial defendant filed a motion to dismiss the indictment. Defendant's Motion to Dismiss (11/29/90); Memorandum in Support of Motion to Dismiss (3/5/91). In that motion, defendant argued that the federal mail fraud statute, as interpreted by this Court in *McNally v. United States*, 483 U.S. 350 (1987) and *Carpenter v. United States*, 484 U.S. 19 (1987), did not apply to his case because the partnership funds in question were jointly owned by the partners and could not, therefore, qualify as property of another within the meaning of the mail fraud statute. The District Court denied the motion. *See* Appendix. On the government's motion the District Court also ordered defendant's counsel to make no reference to the joint ownership of partnership property. Joint Appendix, at 111, 165-69.

Trial before a jury commenced on April 3, 1991. After the prosecution rested, defendant moved for a judgment of acquittal arguing that the evidence failed to establish that the mailings were "incident to an essential part of the scheme." *Id.* at 419-435. The District Court denied the motion. *Id.* at 435.

The defense rested without presenting any evidence. The jury returned a verdict of guilty on all eleven counts. *Id.* at 514. Defendant was sentenced to eighteen months in prison, followed by three years of supervised release. *Id.* at 519-520. Defendant was also ordered to pay restitution of $48,361.06 – the bulk of the partnership assets having already been returned to the firm. *Id.* at 521. The restitution portion of the sentencing order was a partnership accounting in federal court instead of in state court under the Uniform Partnership Act.

On direct appeal, pursuant to 28 U.S.C. § 1291, defendant raised, briefed and argued two issues, each of which was dispositive of this case, and each of which raised important issues of statutory construction in the context of federal

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the alleged violation of § 1342, namely, applying for a post office box with a fictitious name in connection with a mail fraud scheme. Thus if the convictions on the mail fraud counts are reversed, the conviction under § 1342 must be reversed as well.

criminal law. First, defendant argued that his conviction conflicted with three decisions of this Court, decisions that held the mail fraud statute inapplicable to routine and innocent mailings of business documents that take place after a scheme to defraud has reached fruition.[3] Appellant's Brief, at 20-31. Second, defendant argued that the mail fraud statute did not apply to transactions between joint owners of property. Such transactions cannot, by definition, "deprive another of money or property" within the meaning of the mail fraud statute as interpreted by this Court. *Id.* at 32-41.

A divided panel of the Court of Appeals for the Fourth Circuit affirmed defendant's conviction in a per curiam, unpublished opinion. *See* Appendix. In so doing, the panel majority addressed only the first issue raised by the defendant, and with respect to that issue, the panel majority did not mention or cite the relevant decisions of this Court. Instead, the panel relied upon a 1976 Fourth Circuit decision that neither party to the appeal had briefed. The second issue raised by defendant was ignored completely. Defendant's Petition for Rehearing and Suggestion for Rehearing In Banc noted these incongruities, but was denied. *See* Appendix.

ARGUMENT

Rule 10 of the Supreme Court Rules provides guidance as to the "character of reasons" that will be considered in deciding whether to grant a writ of certiorari. The issues presented by this Petition for a Writ of Certiorari fit precisely within the character of reasons provided in Rule 10.

First, the decision of the court of appeals with respect to the sufficiency of the mailings "conflicts with applicable decisions of this Court" in two distinct ways. Rule 10.1(c). Contrary to this Court's decisions in *United States v. Maze*, 414 U.S. 395, 399 (1974); *Parr v. United States*, 363 U.S. 370, 385-91 (1960); *Kann v. United States*, 323 U.S. 88,

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[3] *United States v. Maze*, 414 U.S. 395, 399 (1974); *Parr v. United States*, 363 U.S. 370, 385-91 (1960); *Kann v. United States*, 323 U.S. 88, 94-95 (1944).

94-95 (1944), the Fourth Circuit's decision expands the scope of federal mail fraud into areas Congress has shown no intent to criminalize. The court of appeals decision also creates a federal felony out of conduct which, although admittedly unethical, does not meet the definition of fraud announced by this Court in *McNally v. United States*, *supra*, and *Carpenter v. United States*, *supra*.

Second, the expansive reading of the mail fraud statute implicitly endorsed by the court of appeals and explicitly enforced by the executive branch raises "important question[s] of federal law which ha[ve] not been, but should be, settled by this Court" – namely, the extent to which the executive branch can define the scope of federal criminal law with little or no reference to the underlying statutory scheme. Rule 10.1(c). In this regard, the court of appeals decision is incompatible with recent decisions by this Court applying strict rules of construction to federal criminal statutes.

Third, by failing to address a nonfrivolous and dispositive issue on a direct criminal appeal, the court of appeals "has so far departed from the accepted and usual course of judicial proceedings . . . as to call for an exercise of this Court's power of supervision." Rule 10.1(a). With respect to this final point, at the very least defendant is entitled to a remand in which the court of appeals is instructed to address and resolve the unanswered issue regarding the applicability of mail fraud to intra-partnership disputes. Certainly if a defendant has a statutory right to a direct criminal appeal, that right imposes a correlative duty upon the appellate court to resolve all nonfrivolous and dispositive issues properly raised in the direct criminal appeal.

I

Under the Rules of Lenity and Common Law Meaning, the Mail Fraud Statute Cannot be Construed to Apply to Deceptions Between Joint Owners of Partnership Property.

The scope of federal criminal law is not limited by the common law; nor is it limited by state statutory law. In the

exercise of its Article I powers, Congress is free to create criminal sanctions in a broad range of contexts, including areas previously untouched by state or common law. Assuming Congress has properly exercised a pertinent enumerated power, the critical inquiry with respect to the scope of federal criminal law requires a determination of precisely which activities Congress intended to criminalize. This clearly gives Congress a wide degree of latitude in fashioning a federal law of crimes.

Federal criminal law is not, however, created in a vacuum. Despite the potential breadth of federal criminal law, it remains true that the scope of any particular federal crime will be informed by the relevant principles of common law that serve as a definitional backdrop for the enactment. It is presumed, for example, that when Congress uses specific terms of art, it does so with reference to commonly accepted legal definitions of those terms. Thus although federal criminal law is not limited by state or common law, those bodies of jurisprudence provide an important reference point from which to determine exactly what Congress intended when it adopted a particular criminal sanction.

Implicit in the foregoing observations is the overarching principle that federal criminal law is created by Congress and not by the executive or judicial branches. *McNally v. United States*, 483 U.S. 350, 360 (1987). Nothing in the Constitution authorizes the executive branch to create criminal liability; nor is the federal judiciary authorized to fashion a federal common law of crimes. The critical question in any federal criminal prosecution, therefore, is whether Congress intended to create criminal liability under the circumstances presented. The key to answering that question will be found in time-honored rules of statutory construction.

The first such rule relevant in the present context is the rule of lenity. That rule provides that "before a man can be punished as a criminal under the federal law his case must be plainly and unmistakably within the provisions of some statute." *United States v. Gradwell*, 243 U.S. 476 (1917). In *Crandon v. United States*, 110 S.Ct. 997 (1990), this Court described the rule of lenity in the following terms: "To the

extent that the language or history of [a statute] is uncertain, this 'time honored interpretive guideline' serves to ensure both that there is fair warning of the boundaries of criminal conduct and that legislatures, not courts, define criminal liability." *Id.* 1001-02.

Last term a majority of this Court applied the rule of lenity in construing a provision of the National Firearms Act. *United States v. Thompson/Center Arms Company*, 112 S.Ct. 2102 (1992). At issue was whether a pistol packaged with a conversion kit had been "made" into a short-barreled rifle within the meaning of the NFA. The plurality opinion, authored by Justice Souter and joined by Chief Justice Rehnquist and Justice O'Connor, concluded that "[a]fter applying ordinary rules of statutory construction . . . we are left with an ambiguous statute." *Id.* at 2109. Since the NFA had criminal applications, the plurality concluded that the rule of lenity required that the ambiguity be resolved against coverage by the Act. *Id.* at 2110. Justice Scalia, joined by Justice Thomas, disagreed as to the basis of the NFA's ambiguity, but agreed that the statute was ambiguous and that the rule of lenity precluded application of the NFA to the facts presented. *Id.*

The rule of lenity must be read in conjunction with a second principle of statutory construction – the rule of common law meaning:

> "[W]here Congress borrows terms of art in which are accumulated the legal tradition and meaning of centuries of practice, it presumably knows and adopts the cluster of ideas that were attached to each borrowed word in the body of learning from which it was taken and the meaning its use will convey to the judicial mind unless otherwise instructed. In such a case, absence of contrary direction may be taken as satisfaction with widely accepted definitions, not as departure from them."

Morissette v. United States, 342 U.S. 246, 263 (1952).[4] Justice Frankfurter phrased this principle as follows: "[I]f a word

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[4] See *Moskal v. United States*, 111 S.Ct. 461, 471-78 (Scalia, J., dissenting, joined by Justices O'Connor and Kennedy).

is obviously transplanted from another legal source, whether the common law or other legislation, it brings its soil with it."[5]

Putting these two principles together, the interpretation of a criminal statute relying upon legal terms of art must be construed consistently with the legal tradition surrounding those terms of art, and any reasonable doubt or ambiguity with respect to coverage of the criminal statute must be resolved against that coverage. Application of the confluence of these principles here leads to the conclusion that the mail fraud statute cannot be applied under the present circumstances.

The mail fraud statute criminalizes the use of the mails when that use is part of a "scheme or artifice to defraud." The meaning of this phrase is obviously of critical importance. Only if an individual has in fact engaged in a scheme or artifice to defraud can there be a prosecution for mail fraud. Since fraud is a legal term of art with an accumulated and accepted meaning, it must be presumed that Congress intended to incorporate that meaning into the mail fraud statute. The sparse legislative history of the mail fraud statute does not in any manner rebut this presumption.[6] Thus the phrase, "scheme or artifice to defraud," must be interpreted with reference to the common law. *McNally v. United States, supra,* 483 U.S., at 358-60. Reference to that body of jurisprudence makes it quite clear that as between partners there were no such crimes at common law.

"At common law, it was not a criminal offense for one co-owner of goods fraudulently to deprive other co-owners of them." 1 M. Hale, Pleas of the Crown 513. *Accord* J. Steven, *A History of the Common Law of England* 159 (1888); L. Hailsham, 9 *Halsbury's Laws of England* 505, n.(t) (2d ed. 1933); C. Torcia, 3 *Wharton's Criminal Law* at § 419 (14th ed.

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[5] Frankfurter, "Some Reflections on the Reading of Statutes," 47 Colum.L.Rev. 527, 537 (1947).

[6] Cong.Globe, 41 Cong., 3d Sess. 35 (1870)(remarks of Rep. Farnsworth).

1980). Similarly, a partner could not be convicted of embezzling or stealing partnership property. W. LaFave & A. Scott, Jr., *Criminal Law* 636, 648-49 (1972); R. Perkins, *Perkins on Criminal Law* 244 (2d ed. 1969). These common law rules have been followed consistently throughout the United States. This is because partners own an undivided interest in partnership property, giving each partner, in essence, the rights of sole proprietorship. Most importantly, this was the accepted rule at the time the mail fraud statute was adopted in 1872 as well as in 1909, the last time the statute was substantively amended.[7]

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[7] *Accord United States v. Taylor*, 867 F.2d 700 (D.C.Cir. 1989); *Adams v. State*, 189 So. 2d 354, 359 (Ala.Ct.App. 1966); *Kent v. State*, 220 S.W. 814, 814 (Ark.S.Ct. 1920); *Hudson v. State*, 408 So. 2d 224 (Fla.Dist.Ct.App. 1981); *Fox v. State*, 105 S.E.2d 368, 369 (Ct.App.Ga. 1958); *State v. Quinn*, 64 N.W. 2d 323, 325-27 (S.Ct.Iowa 1954); *People v. Dettmering*, 116 N.E.205 (S.Ct.Ill. 1917); *State v. Matthews*, 28 N.E. 703, 704 (S.Ct.Ind. 1891); *Gary v. Northwestern Mutual Aid Ass'n*, 53 N.W. 1086, 1087-88 (S.Ct.Iowa 1893); *State v. Quinn*, 64 N.W.2d 323, 324 (S.Ct.Iowa 1954); *Maloney v. Commonwealth*, 95 S.W.2d 578, 578-79 (Ct.App.Ky. 1936); *Pierce v. Commonwealth*, 276 S.W. 135, 136 (Ct.App.Ky. 1925); *Commonwealth v. Novick*, 142 N.E. 771 (S.J.Ct.Mass. 1924); *Burroughs v. State*, 406 So.2d 814, 815-16 (S.Ct.Miss. 1981); *State v. Ossendorf*, 208 S.W.2d 209, 210 (S.Ct.Mo. 1948); *State v. Brown*, 99 P. 954, 957 (S.Ct.Mont. 1909); *State v. Elsbury*, 175 P.2d 430, 432 (S.Ct.Nev. 1946); *People v. Zinke*, 555 N.E.2d 263, 267 (N.Y. Ct. App. 1990); *People v. Dudley*, 97 N.Y.S.2d 358 (1950) *People v. Hart*, 99 N.Y.S. 758, 761 (1906); *State v. Brown*, 343 S.E.2d 553 (Ct.App.N.C. 1986); *State v. King*, 460 N.E.2d 1143, 1146 (Ct.App.Ohio 1983); *Commonwealth v. Bovard*, 95 A.2d 173, 176-77 (S.Ct.Pa. 1953); *State v. Snell*, 9 R.I. 112 (1868); *Patterson v. Bogan*, 198 S.E.2d 586, 588 (S.Ct.S.C. 1973); *State v. Reddick*, 48 N.W. 846, 847 (S.Ct.N.D. 1891); *Hall v. State*, 279 S.W. 464 (Tex.Crim.App. 1926); *O'Marrow v. State*, 147 S.W.252, 253 (Tex.Crim.App. 1912); *State v. Burnett*, 712 P.2d 260, 262 (S.Ct.Ut. 1985); *Payne v. Commonwealth*, 281 S.E.2d 873, 875 (S.Ct.Va. 1981); *State v. Bemis*, 242 P. 802 (S.Ct.Wyo. 1926). *See also Oddo v. Ries*, 743 F.2d 630 (9th Cir. 1984)(partner cannot be found liable for the infringement of a copyright held by the partnership). A few states have adopted statutes specifically abrogating the common law rule. *People v. Sobiek*, 106 Cal.

The rule with respect to partners was recently described and applied in *People v. Clayton*, 728 P.2d 723 (S.Ct.Colo. 1986). The *Clayton* court found that "factors indicate a need for caution in extending criminal liability to partnership disputes." *Id.* at 724. The court explained:

> The common law rule is that a partner cannot be guilty of embezzlement or larceny of partnership property. [Citations omitted.] Jurisdictions in which partners have been found guilty of larceny or embezzlement from a partnership have statutory authority for the departure from common law. [Citations omitted.]
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> . . . . Under both the common law and the UPL [Uniform Partnership Law], partners are joint owners of property. . . . It is far from clear that the General Assembly intended for the wrongful taking of partnership property to be theft under section 18-4-401. Criminal statutes are to be strictly construed in favor of the accused in order to give all persons fair notice of what constitutes a criminal act. [Citations omitted.] We conclude that, without specific statutory authority, the unauthorized taking by a partner of partnership assets is not a crime.

Id. at 724-26. There is absolutely no indication that Congress intended to alter this basic understanding of criminal liability through the mail fraud statute.[8]

The government in the present case has never disputed the above contentions with respect to the nonapplicability of common law crimes or State criminal statutes to deceptions involving partnership property. Indeed, as the authorities cited

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Rptr. 519 (Cal. App. 1973); *Kirschenbaum v. Kirschenbaum*, 793 P.2d 1102, 1106 (Ct.App.Ariz. 1990); *State v. MacGregor*, 279 N.W. 372, 372-73 (S.Ct.Minn. 1938); *State v. Siers*, 248 N.W.2d 1, 6 (S.Ct.Neb. 1976); *State v. Joy*, 827 P.2d 1065, 1067-68 (Ct.App.Wash. 1992).

[8] The partnership relationship is unique. Because of the indivisible nature of partnership property, partners cannot even sue each other at law for damages. Their exclusive remedy is an action at equity for an accounting.

in footnote 7, *supra*, indicate, the government could not in good faith do so. Rather the government attempted to sidestep this point with the following cavalier observation, "[W]hile there is a significant body of law having to do with the fact that . . . common law said a partner cannot embezzle from the partnership itself, that those rather old fashioned notions have gone by the board and that a new and very rational area of law is developing."[9] The court of appeals apparently agreed. But adoption of this "new and very rational" approach to construing a criminal statute is inconsistent with the rules of lenity and common law meaning, both of which have been recently endorsed by at least five members of this Court.

The creation of a novel criminal liability under the mail fraud statute is an example of the extent to which prosecutors have strayed from the legitimate scope of the congressional enactment. Misappropriation of jointly-owned property is not remotely related to the types of schemes with which Congress was concerned when it passed a statute to prevent abuse of the postal system. In light of the strong common law tradition against creating criminal liability for such transactions, to so apply the mail fraud statute will affect a substantial reworking of criminal law and an invasion of the state's prerogative without any guidance from Congress. *United States v. Bass*, 404 U.S. 336, 349 (1971)(Court will not lightly assume that Congress intended to alter "sensitive relation between federal and state criminal jurisdiction"). Certainly, the scope of federal criminal law should not be extended into such uncharted waters in the absence of a clear congressional intent to do so. *McNally v. United States*, *supra*, 483 U.S., at 359-60. In the words of one federal judge:

> [I]t wasn't a big jump for Congress to say that it was necessary and proper to the postal power to regulate the use of the mails in frauds. . . . But it is a heck of a jump from what Congress actually said to say that any time somebody is involved in a

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[9] Joint Appendix, at 32-33.

> scheme or artifice to defraud and the mails happen to be used, then the federal government, the central government, is going to get involved. To make that leap is an invasion of the legislative by the executive, assisted by the judicial, and it is an invasion of our proper federalism.[10]

The Fourth Circuit, however, has implicitly endorsed an approach to federal criminal law that is directly at odds with the above principles. By so doing, the court of appeals has provided a green light for federal prosecutors to approach federal criminal law in a most expansive manner, without any reference to principles of separation of powers or federalism, and without guidance from applicable rules of statutory construction. This Court's intervention and guidance would seem essential. Indeed, this case presents an ideal opportunity for clearly articulating and applying a workable framework for the statutory analysis of federal criminal laws.

II

Under this Court's Decisions in *McNally v. United States* and *Carpenter v. United States*, the Assets of a Partnership do not Qualify as Property of Another as Between Partners as Required by the Mail Fraud Statute.

In *McNally v. United States*, 483 U.S. 350 (1987), and *Carpenter v. United States*, 484 U.S. 19 (1987), this Court held that mail fraud extended only to deceptive practices that "deprive *another* of money or property. . . . " 484 U.S., at 27 (emphasis added); 483 U.S., at 358-60. By so ruling, this Court rejected the notion that the federal mail fraud statute was nothing more than an invitation to create an endlessly evolving federal common law of crimes. The essence of the *McNally* decision was that the scope of federal criminal law was to be defined by Congress and not by the

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[10] Symposium, "Federalism and the Scope of the Federal Criminal Law," 26 Am. Crim. L. Rev. 1737, 1763 (1989) (Presentation by Honorable David Sentelle, United States Court of Appeals, District of Columbia Circuit).

executive or judicial branches.[11] The mail fraud statute could not, therefore, be used to create novel grounds for criminal liability in the absence of specific direction from Congress. In this sense, *McNally* represented an abrupt departure from a long line of lower federal court cases that permitted the application of the mail fraud statute to a wide variety of circumstances well beyond the contemplation of Congress. The philosophy behind those cases – capsulized in the prosecutor's maxim, "when in doubt, charge mail fraud," – has not, however, evaporated. Federal prosecutors continue to view mail fraud as a catch-all federal crime, and the court of appeals decision in this case endorses that erroneous and unconstitutional view.

The immediate case is incompatible with *McNally* and *Carpenter* in several significant ways. First, the specific holdings of *McNally* and *Carpenter* establish that the mail fraud statute can be violated only by conduct that deprives another of property. 483 U.S., at 358-60; 484 U.S., at 27. This conclusion is consistent with the common law view that embezzled property must be property of another in order to be actionable.[12] That same common law view

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[11] In *McNally*, this Court used the rule of common law meaning as the principle tool of statutory construction in determining that the mail fraud statute covered only conduct that deprived another of property. An application of that rule here leads to the conclusion that mail fraud was not designed to criminalize disputes involving jointly-owned partnership property.

The word "another" used by this Court in *McNally* and *Carpenter* and by Congress in 18 U.S.C. § 1346, is "obviously transplanted from another legal source." *See* note 5, *supra*. That source is the common law and state statutes relating to crimes against property. In proscribing crimes against property, legislatures routinely use the term property of *another* to exclude partnership property from the reach of the law. *See* note 12, *infra*.

[12] 3 Wharton's Criminal Law, § 15 (1980), *cited in United States v. Taylor*, 867 F.2d 700, 702-03 (D.C.Cir. 1989) ("Because the property converted by an embezzler must belong to *another*, a defendant cannot embezzle property he owns jointly."); *Patterson v. Bogan*, 198 S.E.2d 586 (S.C. 1973) ("As each partner is the ultimate owner of an undivided interest in all the partnership property, none of such property can be said, with reference to any partner, to be the property of *another*."). *See also*

also establishes that as between partners, partnership property is not the property of another.[13] Significantly, under West Virginia law a partner is deemed a co-owner of partnership property and as such has a right to possess that property.[14] Therefore, consistent with *McNally* and *Carpenter*, as well as with the previously discussed rules of lenity and common law meaning, a partner cannot be held criminally liable for defrauding a co-partner of jointly-owned partnership property.[15] In the absence of some clear showing of congressional intent to the contrary, of which there is none, it must be presumed that the mail fraud statute was not intended to alter this basic tenet of the crime of fraud. The Fourth Circuit's decision is premised upon precisely the opposite presumption.

Second, the analysis by this Court in *McNally* clearly shows that the state of the law at the time the mail fraud statute was enacted is of critical importance. 483 U.S., at 356-59. The common law rules discussed above were applicable before and during the time Congress enacted the mail fraud statute, as well as during that period of time surrounding the 1909 amendments.[16] Indeed, those

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Embezzlement, Larceny, False Pretenses, or Allied Criminal Fraud by a Partner, 82 A.L.R.3d 822, 826-27 (1978) (as between partners, partnership property is not the property of another); *State v. Brown*, 343 S.E.2d 553, 56-57 (N.C.Ct.App. 1986) (embezzled property must be property of another); *State v. Houdeyshell*, 329 S.E.2d 53, 56 (W.Va. 1985) (same).

[13] *Id.*

[14] West Virginia Code § 47-8A-25.

[15] In both the district court and the Fourth Circuit, the government did not dispute that criminal sanctions against fraud under state law and common law have been limited in their application to the "property of another." The government has, however, refused to acknowledge the relevancy of state law and common law to the interpretation of a federal statute. Yet, this Court has traditionally relied on state and common law to define federal statutes involving property interests. *See, e.g., McNally v. United States*, 483 U.S. 350, 358 n.8 (1987).

[16] See, e.g., *State v. Matthews*, 28 N.E. 703, 704 (S.Ct.Ind. 1891) ("It is well settled that a partner cannot commit a crime by any acts relating to the possession of the partnership property, such as embezzlement, larceny,

rules still prevail throughout the United States in the absence of a specific statutory provision to the contrary. To paraphrase the Court in *McNally*:

> "It may well be that Congress could criminalize using the mails to further [a dispute over jointly-owned partnership assets], even if there is no state law proscribing [such conduct] or even if state law expressly authorized it. But if state law expressly permitted or did not forbid [such conduct], it would take a much clearer indication than the mail fraud statute evidences to convince us that [such conduct] is forbidden under federal law."

483 U.S. at 361 n.9. The court of appeals decision, on the other hand, completely ignores these principles by allowing the government to promote and apply federal criminal law in a manner that significantly alters the accumulated and accepted meanings of the operative terms of the statute.

Finally, an observation this Court made in *McNally* seems particularly appropriate:

> "The Court has often stated that when there are two rational readings of a criminal statute, one harsher than the other, we are to choose the harsher only when Congress has spoken in clear and definite language. [citations omitted] As the Court said in a mail fraud case years ago: 'There are no constructive offenses; and before one can be punished, it must be shown that his case is plainly within the statute.' "

483 U.S., at 359-60. Given the accumulated and accepted meaning of fraud at common law, the only rational reading of the mail fraud statute would not encompass deceptions in the context of jointly-

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or burglary."); *State v. Reddick*, 48 N.W. 846, 847 (S.Ct.S.D. 1891) (adopting common law rule); *People v. Hart*, 99 N.Y.S. 758, 761 (1906) ("It is a rule of law that, even though one partner misappropriates the money of a partnership, he does not steal it from his partner because the interests of copartners are joined. They are not severed in so far as a criminal transaction is concerned."); *State v. Brown*, 99 P. 954 (S.Ct.Mont. 1909)(adopting common law rule).

owned partnership property. Assuming, however, that the government's broad reading of the statute is rational, a choice must be made between two possible meanings: the harsher meaning proposed by the government or the less harsh, but nonetheless rational, reading proposed by defendant. Since Congress has not, "through clear and definite language," chosen the harsher reading, that potential reading cannot be employed. Yet, by affirming defendant's conviction, the court of appeals did precisely that.

In sum, the Fourth Circuit's resolution of this case is inconsistent with the specific holding in *McNally* which limits the scope of federal mail fraud to conduct that deprives another of property. The resolution is also contrary to the general spirit and tenor of the *McNally* decision which limits the scope of federal criminal law to those circumstances Congress clearly and definitely intended to criminalize.

III

Controlling Decisions by this Court are Directly Contrary to the Court of Appeals' Conclusion Regarding the Sufficiency of the Post-Transaction Mailings in this Case.

The government's indictment of Gorrell alleges ten mailings. Counts One to Five charge the mailing of five invoices to Jackson and Kelly clients. These billings, according to the indictment, were in furtherance of Gorrell's "scheme." Counts Six to Ten charge the mailing of payments to Jackson and Kelly by unspecified clients of the firm. *Id.* at 13. Since these client payments were in response to invoices of the nature of those mailed out in the first five counts, the indictment contends that these mailings are also in violation of the mail fraud statute.

Yet, according to the government's own evidence, the invoices mailed to the clients were in no way false or fraudulent. Each client was mailed a bill for a legitimate fee for the actual services rendered, and, most importantly, the bill was mailed after the deception within the partnership was complete.

Since the invoices were totally valid representations of the costs of the legal work done for the client, the mailings were not in furtherance of any scheme. They were routine business documents.

The master account of Jackson and Kelly received precisely the amount of money it would have received if Gorrell had not successfully manipulated internal accounting procedures. Furthermore, by the time of the mailings, Gorrell had already received the HGA checks – indeed, he received and cashed ten of the eleven checks prior to the mailing of the respective invoice. Hence, the mailings were not used in any manner to fund the scheme. The relationship between the deception and the mailing is best capsulized in the following observation: Had a billing clerk failed to mail an invoice, the deceptive transaction would, nonetheless, have been fully consummated. There would have been no recourse against Gorrell.

The court of appeals held, however, that the mailings were in furtherance of the scheme. The vehicle for that holding, a cryptic and unpublished per curiam opinion, is more notable for what it does not say than for what it does say. Most notably, the opinion does not address three significant decisions by this Court – *United States v. Maze*, 414 U.S. 395 (1974), *Parr v. United States*, 363 U.S. 370 (1960), and *Kann v. United States*, 323 U.S. 88 (1944) – each of which was fully briefed by the defendant before the court of appeals, and each of which is directly contrary to the position adopted by the panel majority. Although these cases are not mentioned in the court's opinion, the panel majority's disposition implicitly rejects the substantive holdings of those cases, a brief description of which follows.

In *Parr v. United States*, 363 U.S. 370 (1960), the Supreme Court held that neither the mailing of tax bills by a county assessor-collector nor the return mailing of payments due on such bills were chargeable as "mailings" within the meaning of the mail fraud statute. The parallels between this case and *Parr* are striking. The scheme in *Parr* involved a corrupt school board that, among other things, cashed checks from local taxpayers upon false endorsements and issued checks to fictitious persons for "services rendered," all for the purposes of misappropriating district funds. As part of its scheme, the school board caused legitimate tax bills to be mailed and it received payments on those bills through the mails. As the Court phrased it, "There can be no doubt that the indictment charged and the evidence tended strongly to show that petitioners devised and practiced a brazen scheme to defraud by

misappropriating, converting and embezzling the District's moneys and property." *Id.* at 385. But, the Court went on, "[T]hese were essentially state crimes and could become federal ones, under the mail fraud statute, only if the mails were used 'for the purpose of executing such scheme.' " *Id.* The Fifth Circuit held that they were. The Supreme Court reversed.

The *Parr* Court explicitly rejected the government's expansive theory of mailings. As the defense in *Parr* pointed out, under that theory, the government could make

> federal mail fraud cases out of the conduct of a doctor's secretary or a business concern's billing clerk or cashier in mailing out, in the course of duty, the employer's lawful statements with the design, eventually executed, of misappropriating part of the receipts . . .

Id. at 386. The Court instead focused on the language of the mail fraud statute and concluded that so long as the taxes assessed and collected were not excessive, "padded," or "in any way illegal," *id.* at 387, the lawful mailing of the tax bills and payments on those bills were not " 'for the purpose of executing such scheme,' within the meaning of § 1341. . . . " *Id.* at 391. Despite the fact that defendants fully intended to misappropriate the funds upon their receipt, the innocent and legal mailing of the tax bills which were used to secure the funds did not further the scheme because the bills contained no fraudulent amounts.[17]

In this case the indictment does not allege that the bills sent to clients were in any way fraudulent or padded. As the United States Attorney stated, "[T]he clients were not defrauded. They were paying the appropriate bill for the work that was done." Joint Appendix, at 451. If the invoices mailed

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[17] In *Parr*, this Court emphasized both the legitimacy of the mailings, *i.e.*, the fact that the tax bills were not fraudulent, and the fact that the defendants were compelled by law to assess taxes and "in the circumstances" to mail those assessments. 363 U.S. at 391. In the immediate case, there is no question but that the mailings were legitimate, that the partners expected clients to pay for services rendered and that "in the circumstances" the mails were the usual method for billing clients. Accordingly, the decision in *Parr* is directly on point.

to the clients were not fraudulent and the payments received from them were legitimate, under a parity of reasoning with *Parr*, the mailings charged in Counts One through Ten of this indictment were not for the purpose of executing Gorrell's "scheme."

The tax bills in *Parr* were mailed in the regular course of business in order to collect presumptively lawful taxes; so too were the invoices sent out by Jackson and Kelly billing clerks, the purpose being to collect legitimate fees for legal services. According to the indictment and the evidence, Jackson and Kelly did not receive an honest accounting of Gorrell's hours and was tricked by Gorrell into believing that a portion of the amounts from the true accounting of those hours was instead payments to a company called HGA Associates. That deception was not dependent on any mailing. The clients were not defrauded parties, and any mailings to and from them, specifically documented or in the course of business, did nothing to further the already-completed scheme of Gorrell.

In *United States v. Maze*, 414 U.S. 395 (1974), this Court held that a defendant who stole his roommate's credit card and used it for a three-state vacation was not guilty of mail fraud. The mailings relied upon in that case were the mailings of the credit card sales slips by merchants to the bank, and the follow-up mailings of the bills from the bank to Maze's roommate. These mailings were not sufficient to support a mail fraud conviction because "the mailings here were directed to the end of adjusting accounts between the motel proprietor, the Louisville bank, and Meredith [the roommate]. . . . [Maze's] scheme reached fruition when he checked out of the motel, and there is no indication that the success of his scheme depended in any way on which of his victims ultimately bore the loss." *Id.* at 402. As such, the mailings were not "for the purpose" of executing the scheme. *Id.* at 406.

In this case, Gorrell's plan to misappropriate firm assets was fully executed and consummated by his manipulation of the firm's internal accounting procedures. There was no evidence that the plan's success depended in any manner on the

billing of a client or upon any client's payment of a bill. Had a billing clerk failed to mail any particular invoice or had a client refused to pay on an invoice, the evidence establishes that there would be no recourse against Gorrell.

The scheme in *Maze* reached fruition when Maze checked out of the motel; the scheme here reached fruition when Gorrell completed his manipulation of the firm's internal accounting procedures. In neither case was the mailing for the purpose of executing a scheme. In fact, the circumstances of Gorrell's case are even more tenuously related to mail fraud that those in *Maze*. In *Maze*, the defendant actually caused the mailing of a fraudulent claim on a credit transaction; Gorrell did no such thing. At most, he caused the mailing of a perfectly legitimate bill for services rendered.[18]

Finally, the third controlling precedent involving a post-transaction mailing is *Kann v. United States*, 323 U.S. 88 (1944). Kann and his co-defendants were employees of a corporation who felt they were underpaid. In an attempt to remedy that situation the defendants created a dummy corporation to divert some of their employer's profits into their own pockets. When they received the money in the form of checks, they presented the checks at local banks for payment. The checks were then mailed in the ordinary course of business by the local banks to the banks on which they were drawn. This Court was willing to concede that Kann had "caused" the mailings, but it still reversed Kann's convictions for mail fraud, holding that the mailings were not "for the purpose of executing the fraud." The Court noted:

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[18] *United States v. Maze* was relied upon by the Fourth Circuit in *United States v. Keenan*, 657 F.2d 41, 43 (4th Cir. 1981). In *Keenan* the Fourth Circuit held that "a mailing which occurs after the object of the scheme has been completed is not sufficiently related to the scheme to support a conviction for mail fraud." *Id.* Although *Keenan* involves facts quite similar to those presented here – the internal manipulation of accounting practices and the subsequent mailing of an invoice – and although *Keenan* was fully briefed by the defendant, the panel majority inexplicably failed to mention the decision.

> [T]he scheme in each case had reached fruition. The persons intended to receive the money had received it irrevocably. It was immaterial to them, or any consummation of the scheme, how the bank which paid or credited the check would collect from the drawee bank. It cannot be said that the mailings in question were for the purpose of executing the scheme as the statute requires. . . . [T]he scheme was completely executed as respects the transactions in question when the defendants received the money intended to be obtained by their fraud, and the subsequent banking transactions between the banks concerned were merely incidental and collateral to the scheme and not a part of it.

Id. at 94-95. The convictions were reversed.

The close factual congruence between this case and *Kann* indicates that a similar disposition is appropriate. In both cases the defendants attempted to misappropriate funds by the creation of a fictitious entity. In both cases the defendants received checks for services supposedly rendered by that fictitious entity. In both cases the mailings took place after the consummation of the deception, *i.e.*, after the receipt of the checks, and, hence, were "incidental and collateral to the scheme and not part of it." *Id.* at 95. Specifically, it was immaterial to Gorrell in this case how Jackson and Kelly would recover amounts owed to it by clients. As the government's lead witness testified at trial, non-payment of invoices would have been "written off." Joint Appendix, at 181.

In reversing Kann's conviction, this Court made the following pertinent observation:

> The federal mail fraud statute does not purport to reach all frauds, but only those limited instances in which the use of the mails is a part of the execution of the fraud, leaving all other cases to be dealt with by appropriate state law.

Id. at 95. As in *Kann*, the use of the mails in this case was not a part of the execution of the fraud.[19]

In this Court's decisions in *Maze*, *Parr*, and *Kann*, guidelines are established for determining when mailings of business documents such as invoices can support federal jurisdiction under the mail fraud statute. If the invoice is a routine and innocent document mailed in the regular course of business after the object of the scheme to defraud has been achieved, it does not support federal jurisdiction unless the mailings were incident to an essential part of the scheme. Like the credit card slips in *Maze* and the checks of the dummy corporation in *Kann*, the invoices in this case were mailed after the defendant had obtained the money that was the object of the scheme. Like the tax bills (invoices) in *Parr* that would not support federal jurisdiction, the invoices in this case were routine and innocent. In short, as in *Maze*, *Parr*, and *Kann*, there was no evidence that the mailings here

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[19] The most recent decision by this Court addressing the mailing element of mail fraud is *Schmuck v. United States*, ___ U.S. ___, 109 S.Ct. 1443 (1989). Schmuck, a used-car distributor, set the odometers of cars back before selling them to dealers at artificially inflated prices due to the perceived low mileage. After purchasing cars from Schmuck, the dealers mailed a title application, filled out with the fraudulent odometer reading, to a state agency. Schmuck contended that his mail fraud conviction could not stand because the dealers' mailings were routine and innocent and not related to his fraud. The Court, in a 5/4 decision, upheld Schmuck's conviction on the theory that "[t]he mailing of the title-registration forms was an essential step in the successful passage of title to the retail purchasers." 109 S.Ct. at 1449. In other words, the successful transfer of title, accomplished through the use of a fraudulent title application, was an essential part of Schmuck's scheme. *Id.* at 1448-49. If title could not pass, the cars could not sell and Schmuck's scheme would not succeed. Thus a materially false mailing was an essential part of the scheme.

The *Schmuck* decision, like *Maze*, *Parr* and *Kann*, was briefed by the defendant; the panel majority made no allusion to *Scmuck*; the dissent, however, distinguished *Schmuck* by noting the absence of any showing in the present case that the mailings were "incident to an essential part of the scheme."

were in any manner incident to an essential part of the scheme.

All three of the foregoing cases, *Maze*, *Parr*, and *Kann*, were fully briefed and argued before the court of appeals. The dissent expressly recognized the controlling relevance of *Maze*. Yet the panel majority did not cite, much less discuss, any of these precedents. Instead, through the silent magic of an unpublished per curiam opinion, the panel majority proceeded as if those cases had never been decided.

Since a defendant is entitled to the benefit of this Court's decisions until such time as those decisions are overruled by this Court, and since the Fourth Circuit has violated that basic principle, the case for review of that decision by writ of certiorari seems particularly compelling. Supreme Court Rule 10.1(c) provides that the writ of certiorari may be granted to review a decision by a United States court of appeals "that conflicts with applicable decisions of this Court." The immediate case presents a classic example of precisely such a conflict.

There is a second and substantial reason for reviewing the court of appeals' decision on this point. The "court of appeals has decided an important question of federal law which has not been, but should be, settled by this Court." Supreme Court Rule 10.1(c). The evolution of the mail fraud statute from a criminal proscription designed to ensnare "thieves, forgers, and rapscallions" who sent fraudulent circulars through the mails[20] to a catch-all federal common law crime in which the mailing serves only "as a basis for invoking federal jurisdiction"[21] has been accomplished largely

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[20] Cong. Globe, 41st Cong., 3d Sess. 35 (1870)(remarks of Rep. Farnsworth).

[21] Rakoff, "The Federal Mail Fraud Statute (Part I)," 18 Duquesne L.Rev. 771, 819 (1980). Rakoff, former Chief of Business Frauds Prosecutions of the United States Attorney's Office for the Southern District of New York, is an unabashed cheerleader for ever expanding applications of mail fraud.

through prosecutorial chutzpa. The decisions in *Maze*, *Parr* and *Kann*, were designed to place limits on the crime of mail fraud, limits that are consistent with congressional intent underlying the statute. By ignoring these precedents, the court of appeals has sanctioned an open ended approach to federal criminal law that swings wide the door of latitudinarian interpretation. Justice Scalia's observations in *Schmuck v. United States*, 109 S.Ct. 1443 (1989), seem particularly appropriate:

> The law does not establish a general federal remedy against fraudulent conduct, with the use of the mails as a jurisdictional hook, but reaches only "those limited instances in which the use of the mails is *a part of the execution of the fraud*, leaving all other cases to be dealt with by appropriate state law." . . . In other words, it is mail fraud, not mail and fraud, that incurs liability. This federal statute is not violated by a fraudulent scheme in which, at some point, a mailing happens to occur – nor even by one in which a mailing predictably and necessarily occurs. The mailing must be in furtherance of the fraud.

Id. at 1453-54 (Scalia, J., dissenting)(citations omitted). That obviously is not the view of the United States Attorney's office in West Virginia; nor is it the view of the panel majority in this case. It ought to be the view of this Court.

IV

In a Direct Criminal Appeal, the Court of Appeals must Address and Resolve all Nonfrivolous and Dispositive Issues Properly Raised by the Defendant.

Defendant raised two issues before the court of appeals. The first issue involved the sufficiency of the relationship between defendant's deceptive activity and the subsequent mailings. The court of appeals resolved that issue by ignoring three relevant and authoritative decisions by this Court. The second issue involved the applicability of the mail fraud statute to deceptions in the context of jointly-owned partnership property. The court of appeals resolved that issue by

avoiding any reference to the arguments advanced by defendant. Neither approach comports with sound judicial practice. Moreover, the refusal to address a properly raised issue in a direct criminal appeal undermines the defendant's statutory right to such an appeal.

If a criminal defendant has a statutory right to a direct criminal appeal – which 28 U.S.C. § 1291 clearly provides – then it must follow that the court of appeals has a duty to resolve nonfrivolous issues properly raised on that appeal when resolution of those issues may be dispositive of the case. Were the rule otherwise, the statutory right of appeal would be no right at all, but a privilege addressed to the discretion of the appellate court. Although in the context of discretionary review, a court may select the issues it wishes to resolve, that is not the case with obligatory review. Indeed, the distinction between discretion and obligation rests upon the duty to review imposed in the latter context. Surely a United States court of appeals cannot simply decline to address issues it finds too difficult or problematical. That is, however, precisely what the court of appeals did here.

The issue raised by defendant with respect to the applicability of mail fraud to deceptions in the context of jointly-owned partnership property was raised in a timely fashion before the district court, and fully briefed and argued before the court of appeals. The issue was not buried in a brief raising numerous issues. Rather, it was one of two clearly and plainly stated issues, each separately headed and separately argued. In addition, neither the court of appeals nor the government has suggested that this issue is in any manner frivolous; indeed, the discussion above indicates that the issue is far from frivolous. Finally, a resolution of this issue favorable to the defendant would require reversal of defendant's conviction. In this sense, the issue was plainly dispositive.

As a consequence of all the foregoing factors, the court of appeals had a duty to resolve this issue. Yet, without providing any explanation whatsoever, the court clearly failed to do so. Instead, the court issued a cryptic, unpublished per

curiam opinion that rested upon the implicit assumption that no such issue had been raised. With all due respect, such an approach cannot possibly comport with any sense of justice and judicial responsibility.

Supreme Court Rule 10.1(a) provides that a petition for a writ of certiorari may be granted when a United States court of appeals "has so far departed from the accepted and usual course of judicial proceedings . . . as to call for an exercise of this Court's power of supervision." At the very least, defendant is entitled to a remand with instructions to the court of appeals, requiring that court to resolve the partnership issue.

CONCLUSION

For the foregoing reasons, Petitioner respectfully requests this Court to grant his Petition for a Writ of Certiorari.

Date: August 31, 1992

Respectfully submitted,

ALLAN IDES
Counsel of Record for Petitioner
Washington and Lee University
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APPENDIX

April 30, 1992, Opinion of the Fourth Circuit ..App. 1

June 10, 1992, Order of the Fourth Circuit denying Petition for Rehearing and Suggestion for Rehearing In Banc.....App. 10

April 1, 1991, Order of the District Court denying Defendant's Motion to Dismiss .....App. 11

UNPUBLISHED

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

UNITED STATES OF AMERICA,	)	
Plaintiff-Appellee,	)	
	)	No. 91-5289
v.	)	
GREGORY R. GORRELL,	)	
	)	
Defendant-Appellant.	)	

Appeal from the United States District Court
For the Southern District of
West Virginia, at Charleston.
Charles H. Haden II, Chief District Judge.
(CR-90-298-2)

Argued: March 2, 1992

Decided: April 30, 1992

Before RUSSELL, Circuit Judge, BUTZNER, Senior Circuit Judge, and SIMONS, Senior United States District Judge for the District of South Carolina, sitting by designation.

Affirmed by unpublished per curiam opinion. Senior Judge Simons wrote a dissenting opinion.

COUNSEL

ARGUED: Allan Paul Ides, WASHINGTON & LEE LAW SCHOOL, Lexington, Virginia, for appellant. Mary Stanley Feinberg, Assistant United States Attorney, Charleston, West Virginia, for Appellee. **ON BRIEF:** Rudolph L. diTrapano, P. Rodney Jackson, J. Timothy DiPiero,

DITRAPANO & Jackson, Charleston, West Virginia for Appellant. Michael W. Carey, United States Attorney, Paul Thomas Ferrell, Assistant United States Attorney, Charleston, West Virginia, for Appellee.

Unpublished opinions are not binding precedent in this circuit. See I.O.P. 36.5 and 36.6.

OPINION

PER CURIAM:

On November 16, 1990, a federal grand jury indicted Appellant Gregory Gorrell on ten counts of mail fraud in violation of 18 U.S.C. § 141 (1988) and one count of using a fictitious name in connection with a mail fraud scheme in violation of 18 U.S.C. § 1342 (1988). The jury returned guilty verdicts on all eleven counts on April 4, 1991. The United States District Court for the District of West Virginia entered judgment accordingly. Gorrell appeals his convictions, arguing that the government failed at trial to show the required nexus between Gorrell's scheme to defraud a West Virginia law firm and Gorrell's use of the United States mails. We affirm the district court's judgment.

I.

Appellant Gregory Gorrell was the billing partner in the environmental department of Jackson and Kelly, a West Virginia law partnership. In a scheme to defraud his firm, Gorrell prepared fraudulent internal billing records which substituted fake charges for services that HGA

Associates, a fictitious consulting firm, had purportedly performed on behalf of some clients for a portion of the billable hours that Jackson and Kelly should have properly charged to those clients. Gorrell would add the fake charges in amounts equal to the amounts of the omitted billable hours, such that the total amounts due of the clients, as reflected in the internal records, were equal to the amounts that the clients actually owed Jackson and Kelly for legal services. Thus, Gorrell was later able to mail the clients invoices which correctly stated the total amounts due to the partnership.

As billing partner, Gorrell had authority to issue Jackson and Kelly partnership checks to consulting firms in advance of the time Jackson and Kelly would collect those costs from the client. Gorrell issued eleven Jackson and Kelly checks to HGA Associates, the fictitious entity, and then arranged for these checks to be deposited into an account over which Gorrell had exclusive control. In this manner, Gorrell embezzled $368,630.00 in Jackson and Kelly partnership funds over a two-year period from 1987 to 1988.

II.

Appellants Gorrell's argument on appeal consists of two principal contentions. First, Gorrell argues that the invoices delivered through the Postal Service accurately stated the total amounts that the clients owed Jackson and Kelly, and were not in themselves fraudulent. Second, Gorrell asserts that the invoices were mailed only after Gorrell had received the checks issued to HGA Associates, and therefore were mailed only after his

scheme for embezzling firm funds was complete. Thus, Gorrell argues, the mailing of the invoices could not be in furtherance of a scheme to defraud Jackson and Kelly, and cannot serve as the basis of mail fraud convictions under 18 U.S.C. §§ 1341, 1342.[1]

It is well established that a mailing for the purpose of executing a scheme to defraud is an essential element of an offense under 18 U.S.C. § 1341.[2] *Pereira v. United States*, 347 U.S. 1, 8 (1953). However, "the mailed material may be totally innocent, and yet it still may be found that a scheme to defraud exists" in violation of section 1341. *United States v. Murr*, 681 F.2d 246, 249 (4th Cir.), *cert.*

---

[1] Section 1341 provides in pertinent part,

> Whoever, having devised . . . any scheme . . . to defraud, . . . for the purpose of executing such scheme . . . places in any . . . authorized depository for mail matter, any matter . . . whatever to be sent . . . by the Postal Service, or takes . . . therefrom, any such matter . . . shall be fined not more than $1,000 or imprisoned not more than five years, or both.

18 U.S.C. § 1341 (1988).

Section 1342 provides in pertinent part,

> Whoever, for the purpose of conducting . . . by means of the Postal Service, any scheme . . . mentioned in section 1341 of this title . . . uses . . . any fictitious . . . name . . . shall be fined not more than $1,000 or imprisoned not more than five years, or both.

18 U.S.C. § 1342 (1988).

[2] Because a "scheme . . . mentioned in section 1341" is the offense underlying Gorrell's conviction under section 1342, *see* 18 U.S.C. § 1342, a mailing for the purpose of executing a scheme is also an essential element of Gorrell's offense under section 1342.

denied, 459 U.S. 973 (1982). "[E]ven mailing routine, completely accurate documents can result in a mail fraud violation if the mails were used to further a scheme to defraud." *Ferleger v. First American Mortgage Co.*, 662 F. Supp. 584, 588 (N.D. Ill. 1987). Furthermore, this court has previously stated, "The requisite relation of mailings to the fraudulent scheme 'does not turn on time or space, but on the dependence in some way of completion of the scheme . . . on the mailings in question.' " *United States v. Blecker*, 657 F.2d 629, 636 (4th Cir. 1981), *cert. denied*, 454 U.S. 1150 (1982) (quoting *United States v. LaFerriere*, 546 F.2d 182, 187 (5th Cir. 1977)). Hence, the relevant inquiry is not whether the mailed invoices were accurate documents, nor whether the mailing occurred after Gorrell had completed the diversion of firm funds to HGA Associates, the fictitious entity. Rather, the pertinent question is whether the invoices were mailed in furtherance of Gorrell's scheme to defraud Jackson and Kelly. We are of the opinion that a connection sufficient to support Gorrell's mail fraud convictions exists between the mailing of the invoices and Gorrell's scheme to defraud the law firm.

Our decision in *United States v. Caldwell*, 544 F.2d 691 (4th Cir. 1976), is relevant here. In *Caldwell*, the defendant, a chairman of a West Virginia bank, was indicted along with the State Treasurer of West Virginia on four counts of mail fraud under 18 U.S.C. § 1341. 544 F.2d at 692-93. Pursuant to defendant's scheme, the State Treasurer and his wife stayed at the Greenbrier Hotel, a luxury resort in West Virginia, at the defendant chairman's invitation and at the bank's expense. *Id.* at 693. As a result of the bank's payment of the State Treasurer's

expenses at Greenbrier, the Treasurer, in violation of state law, favored the bank with large deposits of state funds in non-interest-bearing accounts. Rejecting defendant's contention that there was insufficient evidence to show that use of the mails constituted an essential step in the execution of his scheme, we stated,

> Payment to the Greenbrier for the services and accommodations it provided was essential to the scheme, and defendant elected to make payment by mail. It matters not, as defendant argues, that payment could have been accomplished in some other manner . . . or that the bank routinely employed the mails for its countless other routine transactions. The use of the mails need not in and of itself be fraudulent to constitute an offense under the statute. Nor is it a good defense that the materials mailed were innocent in themselves if they are part of a scheme to defraud. All that is needed is proof that the mails played a significant part in the execution of the scheme. That fact was established.

544 F.2d at 696 (citations omitted).

Like the defendant in *Caldwell*, 544 F.2d at 696, who used the mails only to make payments to the Greenbrier which were in themselves accurate, Gorrell mailed to clients invoices which were in themselves honest and accurate. But here, Jackson and Kelly had authorized Gorrell to advance firm funds to clients in order to cover the costs of legitimate consulting services, with the expectation that the firm would later be reimbursed for those costs out of payments from clients on future invoices. Because Gorrell purported to advance firm funds to clients to cover the costs of services rendered by HGA

Associates, the fictitious consulting firm, he used the mailed invoices to obtain the payments needed to reimburse the firm for the funds which he fraudulently diverted to his own benefit. The final step in the fraud occurred when Jackson and Kelly's bookkeeper, who was unaware of the fraud, allocated money received from clients to fees and to expenses in accordance with Gorrell's fraudulent internal billing records. We are therefore persuaded that the mailed invoices "played a significant part" in Gorrell's scheme to defraud his partners, and that the facts of this case are sufficient to convict Gorrell under 18 U.S.C. §§ 1341, 1342.

Our review of the record and the district court's orders discloses that other arguments raised by the Appellant on appeal are without merit.

For the foregoing reasons, the judgment of the district court is hereby

AFFIRMED.

SIMONS, Senior District Judge, dissenting:

I respectfully dissent from the majority opinion in this case because the facts as I understand them to be are very similar to, and come within, the ambit of the rulings in *United States v. Maze*, 414 U.S. 395 (1974), and *United States v. Keenan*, 657 F.2d 41 (4th Cir. 1981). In these cases, appellants' convictions under the mail fraud statute were reversed on the ground that the use of the mails was in no way essential to the success of the appellant's fraudulent scheme.

The majority opinion in this case sets out the background of Gregory Gorrell's scheme, but it does not discuss the uncontroverted testimony of John McClaugherty, the managing partner of Gorrell's law firm. McClaugherty testified that if a client failed to pay an expense that had been prepaid by the firm (like the HGA checks), the firm would absorb the loss and there would be no recourse against the billing attorney. McClaugherty's testimony distinguishes this case from *Schmuck v. United States,* 489 U.S. 705 (1989), since it establishes that the mailings to and from clients were not "incident to an essential part of the scheme." *Ibid,* at 711.[1] The same testimony also makes me unable to join the majority's view that "[Gorrell] used the mailed invoices to obtain the payments needed to reimburse the firm for the funds which he fraudulently diverted to his own benefit."

There is no evidence in the record that Gorrell ever mailed the HGA Associates checks after he received them from his firm's accounting department, nor is there any evidence that any of these checks were forwarded to Gorrell by the mails.

I conclude from the record that any mailing that took place occurred after the appellant had altered the internal accounting of his law firm, so as to accomplish the payment of funds to his fictitious company, HGA Associates. In this connection, the record reveals that the invoices

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[1] The fact that on repeated occasions Gorrell received HGA checks before the corresponding client invoices were mailed is further evidence that such mailings were not "incident to an essential part of the scheme."

received by the clients for whom Gorrell had performed services were for the correct amount, *i.e.*, they reflect the actual work performed by Gorrell for that client and were for the proper amounts due by those clients for regular services rendered.[2] The false billing memos were not sent to the clients.

Once Gorrell had manipulated the firm's accounting procedures, he was free to receive the HGA Associates' checks without any dependence upon any use of the mails. In Judge Mall's persuasive opinion in *Keenan, supra,* this court rejected the government's contention "that because an integral part of the scheme was to have [the victim] process the invoice in the normal course of business, the scheme continued until the invoice was received." 657 F.2d at 43. The court recognized in that case that while the use of the mails to conceal a fraudulent scheme can be conduct coming within the purview of the mail fraud statute, the mailing involved was made by a person not associated with the fraudulent scheme and was not made to prevent the detection of the scheme. I read the record to support the same conclusion here.

Even though I adhor the fraudulent tactics employed by Gorrell in defrauding his law firm, nevertheless, my view is that the holdings in *Maze* and *Kennan, supra,* mandate that Gorrell's conviction under the mail fraud statute be reversed.

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[2] The majority opinion states that "Gorrell was later able to mail the clients invoices which correctly stated the total amounts due to the partnership." I am unable to find support in the record for the view that Gorrell was involved in the mailing of invoices. The testimony of James Lowen indicates that client invoices were mailed by billing clerks in the firm's accounting department.

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

FILED
June 10, 1992

No. 91-5289
CR-90-298-2

UNITED STATES OF AMERICA

Plaintiff - Appellee

v.

GREGORY R. GORRELL

Defendant - Appellant

On Petition for Rehearing with Suggestion for Rehearing In Banc

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Appellant filed a petition for rehearing with suggestion for rehearing in banc. No member of the Court requested a poll on the suggestion for rehearing in banc, and the original judicial panel voted to deny the petition for rehearing.

The Court denies the petition for rehearing with suggestion for rehearing in banc.

Entered at the direction of Judge Russell, with the concurrence of Senior Judge Butzner and Judge Simons, United States District Judge sitting by designation.

For the Court,

/s/ Bert M. Montague
CLERK

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF WEST VIRGINIA

CHARLESTON DIVISION

UNITED STATES OF AMERICA,
Plaintiff,

vs. CRIMINAL NO. 2:90-00298

GREGORY R. GORRELL,

Defendant.

ORDER

Defendant Gregory R. Gorrell has been charged in an eleven count indictment. Counts One through Ten of the indictment charge that the Defendant

> "devised and intended to devise a scheme and artifice to defraud . . . by means of false and fraudulent pretenses, representations and promises."

The indictment further charges that the Defendant anticipated that the U.S. mails would be utilized in the execution of the scheme and artifice to defraud. In response to the indictment, Gorrell has filed a motion to dismiss. The United States has submitted a memorandum of law in opposition, to which Gorrell has replied.

The basis of Counts One through Ten of the indictment is that Gorrell, a partner in a Charleston, West Virginia, law firm, billed certain law firm clients for work he performed in a manner which understated to the firm the value of the services actually provided to the clients. This billing process enabled Gorrell to surreptitiously divert to his own use an amount of money equal to the

difference between the dollar amount of the services actually rendered to, and paid by certain law firm clients, and the dollar amount of the services reported to the law firm through billing memoranda. The indictment alleges that as a result of this scheme, Gorrell defrauded the law firm in the amount of $368,630.00 during the period from approximately 1987 through approximately September, 1988. In his motion to dismiss, Gorrell contends that such conduct is not actionable under the mail fraud statute because (1) the conduct alleged does not constitute fraud under state law; and (2) the property interest involved does not fall within the purview of the mail fraud statute.

18 U.S.C. § 1341 provides in pertinent part that:

> "Whoever, having devised or intended to devise any scheme or artifice [to defraud], [or] [for obtaining money or property by means of false or fraudulent pretenses, representations, or promises] . . . [and] for the purpose of executing such scheme or artifice or attempting to do so, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service or takes or receives therefrom . . . or knowingly causes to be delivered by mail according to the direction thereon . . . [shall be guilty of an offense against the United States]."

The purpose of Section 1341 and its predecessors is to prevent the Post Office Department from being used to carry out fraudulent schemes. See *Durland v. United States*, 161 U.S. 306, 314, 16 S.Ct. 508, 40 L.Ed. 709 (1985) (interpreting a predecessor to Section 1341). See also *U.S. v. States*, 488 F.2d 761, 767 (8th Cir. 1973), *cert. denied* 417

U.S. 909, 94 S.Ct. 2605, 41 L.Ed.2d 212 (1974). The mail fraud statute

> "does not define a scheme to defraud, and it contains no restrictive language excluding any type of fraudulent conduct in which use of the mails plays an essential role. On the contrary, the plain language of the statute condemns any scheme to defraud in which the mails are employed. . . . "

U.S. v. Brewer, 528 F.2d 492, 495 (4th Cir. 1975); *Parr v. U.S.,* 363 U.S. 370, 389, 80 S.Ct. 1171, 4 L.Ed.2d 1277 (1960); *U.S. v. Mandel,* 591 F.2d 1347, 1358 (4th Cir. 1979). In *U.S. v. Mandel, supra,* the Fourth Circuit adopted the language of *Gregory v. U.S.,* wherein the Fifth Circuit stated that:

> "[t]he aspect of the scheme to 'defraud' is measured by a nontechnical standard. It is a reflection of moral uprightness, of fundamental honesty, fair plan and right dealing in the general and business life of members of society."

253 F.2d 104, 109 (5th Cir. 1958); *U.S. v. Bohonus,* 628 F.2d 1167, 1171 (9th Cir.), *cert. denied* 447 U.S. 928, 100 S.Ct. 3026, 65 L.Ed.2d 1122 (1980).

Based upon the foregoing discussion of the law, the Court concludes that Gorrell's conduct as alleged in Counts One through Ten of the indictment, if true, constitutes a "scheme or artifice to defraud."

Gorrell also asserts that to the extent the Government grounds its allegations of fraud on the breach of a fiduciary duty owed by Gorrell to the law firm, such a duty cannot support a conviction under the mail fraud statute pursuant to *McNalley v. U.S.,* 483 U.S. 350, 107 S.Ct. 2875,

97 L.Ed.2d 292 (1987). In *McNally* the Court found that the words "to defraud" as used in the mail fraud statute referred only to the deprivation of property interests and could not be extended to the intangible right of a citizen to honest government. The Supreme Count itself declined to apply the McNally rationale to other intangible right cases. In *Carpenter v. U.S.*, 484 U.S. 19, 108 S.Ct. 316, 98 L.Ed.2d 275 (1987), the Court found that the intangible property rights of the *Wall Street Journal* to confidential business information was in the reach of Section 1341. *Carpenter* significantly narrows the holding in *McNally* and appears to place the state of federal mail fraud law in a pre-*McNally* posture.

Finally, the Court finds controlling, by way of analogy, the Fourth Circuit decision of *U.S. v. Condolon*, 600 F.2d 7 (4th Cir. 1979) (application of the federal wire fraud statute, 18 U.S.C. §1343). In *Condolon*, the court held that:

> "[t]he gravamen of the offense is simply the misuse of interstate communication facilities to execute 'any scheme or artifice to defraud.' [Citations omitted] The prosecution condones no immoral bargain; it concerns itself with neither the victim's loss nor the defendant's gain."

See *U.S. v. O'Malley*, 535 F.2d 589, 592 (10th Cir. 1976); *U.S. v. Bagdasian*, 291 F.2d 163, 164 (4th Cir. 1961).

The Court, therefore, concludes that the nature of the fraud alleged by the Government, if true, may support a conviction under the mail fraud statute. Accordingly, Defendant's motion to dismiss is denied.

Also pending before the Court is Defendant's motion for a pretrial ruling regarding the admissibility of expert

testimony on the issue of alleged fraud or embezzlement by a partner of partnership property. Based upon the overwhelming authority presented in the Government's responsive memorandum holding that such evidence is inadmissible, the Court hereby denies the Defendant's motion.

The Clerk is directed to send a copy of this Order to counsel of record, the United States Marshall for the Southern District of West Virginia and the Probation Office of this Court.

ENTER: April 1, 1991

/s/ Charles H. Haden II
Charles H. Haden II, Chief Judge

(2)

No. 92-383

FILED
NOV 4 1992
OFFICE OF THE CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1992

GREGORY R. GORRELL, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

KENNETH W. STARR
Solicitor General

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QUESTIONS PRESENTED

1. Whether the federal mail fraud statute, 18 U.S.C. 1341, applies to a scheme to defraud one's partners of partnership property.

2. Whether the evidence was sufficient to show that petitioner used the mails for purposes of executing a scheme to defraud.

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In the Supreme Court of the United States

OCTOBER TERM, 1992

No. 92-383

GREGORY R. GORRELL, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-9) is unpublished, but the judgment is noted at 961 F.2d 211 (Table). The opinion of the district court (Pet. App. 11-15) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on April 30, 1992, and a petition for rehearing was denied on June 10, 1992 (Pet. App. 10). The petition for a writ of certiorari was filed on September 1, 1992. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After a jury trial in the United States District Court for the Southern District of West Virginia, petitioner was convicted on ten counts of mail fraud, 18 U.S.C. 1341, and a related count of using a fictitious name to open a post office box for the purpose of committing mail fraud, 18 U.S.C. 1342. The district court sentenced petitioner to 18 months' imprisonment, to be followed by three years' supervised release. In addition, petitioner was ordered to pay restitution in the amount of $48,381.06. The court of appeals affirmed. Pet. App. 1-9.

1. The evidence at trial showed that petitioner, a partner at the West Virginia law firm of Jackson & Kelly, defrauded the firm of $368,630 in partnership fees. Petitioner created a fictitious consulting firm called HGA Associates. He then altered Jackson & Kelly's internal billing records to obtain reimbursement from the law firm for services the sham consulting firm supposedly provided to the law firm's clients. He concealed the fraud by maintaining two sets of billing records. The Kelly & Jackson invoices mailed to clients reflected the amount of legal fees attributable to work the law firm actually performed. Petitioner altered Jackson & Kelly's internal records, however, to omit a portion of those services and substitute in their place the reimbursements to the phony consulting firm. During 1987 and 1988, petitioner used this fraudulent scheme to obtain from Jackson & Kelly 11 checks totalling $368,630 on behalf of HGA Associates. Pet. App. 2-3.

2. Prior to trial, petitioner moved to dismiss the indictment on the ground that he could not, as a

matter of law, be convicted of mail fraud based on a scheme to defraud involving partnership property. The district court denied that motion. Pet. App. 11-15. Petitioner appealed his conviction, and the court of appeals affirmed in an unpublished opinion. *Id.* at 1-9. The court rejected petitioner's contention that the evidence was insufficient to show that the use of the mails furthered the fraudulent scheme. The court held that a mailing may be totally innocent by itself and that "the pertinent question is whether the invoices were mailed in furtherance of [petitioner's] scheme to defraud Jackson & Kelly." *Id.* at 4-5.

The court explained that petitioner "used the mailed invoices to obtain the payments needed to reimburse the firm for the funds which he fraudulently diverted to his own benefit." Pet. App. 6-7. Accordingly, the court was "persuaded that the mailed invoices played a significant part in [petitioner's] scheme to defraud his partners, and that the facts of this case are sufficient to convict" petitioner of mail fraud. *Id.* at 7 (internal quotation marks omitted). The court of appeals further stated that "[o]ur review of the record and the district court's orders discloses that other arguments raised by [petitioner] on appeal are without merit." *Ibid.*[1]

ARGUMENT

The mail fraud statute requires proof of two elements: (1) the existence of a scheme to defraud; and (2) use of the mails to execute the scheme. 18 U.S.C. 1341; *Pereira* v. *United States*, 347 U.S. 1, 8 (1954).

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[1] Senior District Judge Simons, sitting by designation, dissented. Pet. App. 7-9.

The court of appeals correctly concluded that the evidence was sufficient to establish both of those elements.

1. The plain language of the mail fraud statute reaches "any scheme or artifice to defraud." 18 U.S.C. 1341. In this case, petitioner defrauded his law firm, and ultimately his fellow partners, by executing a scheme that secretly allowed him to take for his own use more than $368,000 in partnership funds. Petitioner does not deny that he knowingly and wrongfully used a deceptive scheme to obtain money that belonged to the partnership.[2] Instead, petitioner argues that the mail fraud statute should not apply here. He reasons that "the phrase, 'scheme or artifice to defraud,' must be interpreted with reference to the common law," Pet. 11, and that under the common law, a partner generally was not criminally liable for embezzling or stealing partnership property, Pet. 11-12.

---

[2] Petitioner's scheme violated the partnership agreement, which petitioner signed each year, providing that "[i]n addition to normal Firm income, all fees, commissions, [and] salaries * * * earned by any member * * * shall belong to the Firm." Gov't C.A. Br. 32-33. In addition, petitioner's secret diversion of partnership funds was wrongful under West Virginia statutory law and well-established principles of common law. See, *e.g.*, W. Va. Code § 47-8A-21(1) (1992) ("Every partner must account to the partnership for any benefit, and hold as trustee for it any profits derived by him without the consent of the other partners from any transaction connected with the formation, conduct, or liquidation of the partnership or from any use by him of its property."); 14A Michie's Jurisprudence of Virginia and West Virginia, *Partnership* §§ 19, 25 (1989) (similar).

This Court rejected a contention virtually identical to petitioner's nearly 100 years ago, in *Durland* v. *United States*, 161 U.S. 306 (1896). The defendant in that case argued that the mail fraud statute "reaches only such cases as, at common law, would come within the definition of 'false pretences' " and under the common law "there must be a misrepresentation as to some existing fact and not a mere promise as to the future." *Id.* at 312. The *Durland* Court nonetheless declined to engraft that common law limitation onto the mail fraud statute, explaining:

> The statute is broader than is claimed. Its letter shows this: "Any scheme or artifice to defraud." Some schemes may be promoted through mere representations and promises as to the future, yet are none the less schemes and artifices to defraud.

161 U.S. at 313. The Court concluded that the statute "includes everything designed to defraud by representations as to the past or present, or suggestions and promises as to the future. The significant fact is the intent and purpose." *Ibid.*

The fundamental holding of *Durland*—that the reach of the mail fraud statute is not limited to frauds that would be a crime at common law—is not undercut by *McNally* v. *United States*, 483 U.S. 350 (1987). The *McNally* decision cites *Durland* for the proposition that "the meaning of the phrase 'any scheme or artifice to defraud,' * * * is to be interpreted broadly insofar as property rights are concerned." 483 U.S. at 356. *McNally* holds only that the mail fraud statute must be "limited in scope to the protection of property rights" as opposed to the intangible rights of state citizens to good government. *Id.* at 360.

Because the present case clearly involves property rights, *McNally* is inapplicable. Cf. *Carpenter* v. *United States*, 484 U.S. 19, 25-28 (1987) (*McNally* does not preclude mail and wire fraud prosecution of reporter who violated fiduciary duty by defrauding his newspaper of its intangible property right to confidential information).[3]

Petitioner's argument is not only inconsistent with this Court's decisions, but also makes little sense. Petitioner's efforts to prohibit application of the mail fraud statute to frauds among partners would have the perverse effect of exempting misconduct among those who owe fiduciary duties to one another. As Judge Posner has explained, "Fraud in the common law sense of deceit is committed by deliberately misleading another by words, by acts, or, in some instances—notably where there is a fiduciary relationship, which creates a duty to disclose all material facts—by silence." *United States* v. *Dial*,

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[3] Petitioner quotes a footnote from *McNally* that "if state law expressly permitted or did not forbid [such conduct], it would take a much clearer indication than the mail fraud statute evidences to convince us that [such conduct] is forbidden under federal law." Pet. 18 (quoting and paraphrasing 483 U.S. at 361 n.9). That footnote does not avail petitioner, because his conduct *was* forbidden under state law (and under the partnership agreement). See note 2, *supra*. Petitioner disputes whether his wrongful conduct would have been punishable as a state law crime or whether instead his partners would have been limited to some form of civil remedy against him. That issue, however, is irrelevant to the scope of the federal mail fraud statute, since "fraud" within the meaning of the mail fraud statute is not limited to conduct that would constitute a crime under state law.

757 F.2d 163, 168 (7th Cir.) (affirming mail and wire fraud convictions), cert. denied, 474 U.S. 838 (1985). Petitioner undeniably breached a fiduciary duty when he secretly converted over $368,000 of partnership assets to his own use. His actions are no less fraudulent simply because his victims were his partners.

Petitioner identifies no conflict among the lower courts on this issue. Indeed, the court of appeals' decision in this case is consistent with the only lower court case expressly discussing whether a partner may be convicted under the mail and wire fraud statutes for schemes victimizing his fellow partners. See *United States* v. *Pisani*, 590 F. Supp. 1326, 1337 (S.D.N.Y. 1984) (law firm partner), aff'd in part and rev'd in part on other grounds, 773 F.2d 397 (2d Cir. 1985). Other courts have affirmed similar convictions without discussing the issue. See, *e.g.*, *United States* v. *Kuna*, 760 F.2d 813 (7th Cir. 1985) (affirming mail fraud convictions of general partner who misused partnership funds).[4]

2. Petitioner also challenges (Pet. 19-27) the sufficiency of the evidence that the mailings were in furtherance of his fraudulent scheme. The court of appeals properly rejected that claim. Petitioner's argument that "the invoices mailed to the clients

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[4] Petitioner criticizes the court of appeals (Pet. 8, 27-29) for summarily rejecting his attempt to limit the mail fraud statute. The district court, however, had issued a five-page memorandum order detailing the reasons it found petitioner's argument without legal merit. See Pet. App. 11-15. The court of appeals appropriately concluded that petitioner's argument was "without merit" and did not warrant discussion. Pet. App. 7.

were in no way false or fraudulent" (Pet. 19) is beside the point. As this Court has explained, "'innocent' mailings—ones that contain no false information—may supply the mailing element" of a mail fraud prosecution. *Schmuck* v. *United States*, 489 U.S. 705, 715 (1989) (citing *Parr* v. *United States*, 363 U.S. 370, 390 (1960)).

In *Schmuck*, the Court found that the government satisfied the mailing element by showing that a car distributor obtained used cars, rolled back their odometers, and resold the cars to unwitting dealers who consummated retail sales by mailing title application forms to the State on behalf of the buyers. The Court explained that it is sufficient if mailing is "incident to an essential part of the scheme" or a "step in [the] plot." 489 U.S. at 710-711. Schmuck's scheme was an "ongoing fraudulent venture," *id.* at 711, and "[a] rational jury could have concluded that the success of Schmuck's venture depended upon his continued harmonious relations with, and good reputation among, retail dealers." *Id.* at 711-712. It was immaterial that the dealers' use of the mails occurred after they purchased the cars. "Schmuck's scheme would have come to an abrupt halt if the dealers either had lost faith in Schmuck or had not been able to resell the cars obtained from him." *Id.* at 712.

The Court's decision in *Schmuck* is directly on point here. As in that case, petitioner concocted an "ongoing fraudulent venture" rather than "a 'one-shot' operation." 489 U.S. at 711. The ongoing success of that scheme depended on petitioner's replenishing with additional partnership revenues the partnership funds he diverted to HGA Associates.

Those revenues were obtained by mailing invoices to clients, who in the course of paying for legal services provided funds for continuing petitioner's fraud. As in *Schmuck*, the mailings at issue were "incident to an essential part of the scheme," 489 U.S. at 711, and therefore distinguishable from the mailings involved in *United States* v. *Maze*, 414 U.S. 395 (1974); *Parr* v. *United States*, *supra*; and *Kann* v. *United States*, 323 U.S. 88 (1944). See *Schmuck*, 489 U.S. at 712-715. The mailing of the client invoices provided a continuous inflow of revenues and allowed petitioner to maintain his ruse that the law firm clients were receiving services from a non-existent consulting firm.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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NOVEMBER 1992

Supreme Court, U.S.
FILED
NOV 9 1992
OFFICE OF THE CLERK

No. 92-383

In The

Supreme Court of the United States

October Term, 1992

GREGORY R. GORRELL,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondents.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

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QUESTIONS PRESENTED

1. May the executive branch of the United States government, consistent with the rules of lenity and common law meaning as well as with this Court's decisions in *McNally v. United States* and *Carpenter v. United States*, use the mail fraud statute to create a novel basis for criminal liability between joint owners of property in the absence of any indication that Congress intended to impose such liability?

2. May a federal criminal prosecution in a mail fraud case be premised on routine and innocent mailings of business invoices or checks which occur after completion of the scheme to defraud and on which the success of the scheme does not depend?

3. May a federal court of appeals adjudicating a direct criminal appeal decline to address, without comment or elaboration, a nonfrivolous and dispositive issue properly raised and fully briefed by a criminal defendant?

ARGUMENT

1. In response to Petitioner's argument that absent a showing of congressional intent the mail fraud statute cannot be construed to criminalize the wrongful conduct of a joint owner of partnership property, the government argues that the reach of the mail fraud statute is not limited to crimes under common law and the laws of the states, citing this Court's decision in *Durland v. United States,* 161 U.S. 306 (1896). The government's reliance on *Durland* misses the issue, which is whether Congress intended to impose criminal liability on a joint owner of property. The closest the government comes to addressing the issue is at page 6, n.3, of its brief in opposition, where it states that the language in *McNally* relied upon by Petitioner at Pet. 18 is of no avail because Petitioner's conduct "was forbidden under state law (and under that partnership agreement)." The point is that Petitioner's conduct, the breach of a partner's fiduciary duty under state law and a partnership agreement, are subject only to civil sanctions – an action for an accounting. Without any showing of congressional intent, the government has transformed a civil wrong under state law into a federal felony.

Unlike the defendant in *Durland,* the Petitioner had an ownership interest – as a joint owner – in the property at issue. The law in this country for over two centuries, and in England before that, has been that a joint owner of property has all the legal rights to possession and use that a sole owner of the same property would have, subject only to a later accounting under civil law. The law is NOT that a joint owner has limited property rights or, as the government would have it, no property rights at

all. Simply stated, the law is that a joint owner may do anything with jointly owned property that could be done if the property were solely owned, subject only to a later accounting. Therefore, the law has never criminalized the conduct of a joint owner with respect to his own property, regardless of how deceptive that conduct may be. The mail fraud statute shows no congressional intent to alter Petitioner's property rights.

2. This Court's decision in *Durland* does not negate the doctrine of common law meaning or the rule of lenity in construing the mail fraud statute. The *Durland* decision does not support the government's construction of the mail fraud statute to alter basic tenets of partnership law and criminal law. The amendment of the mail fraud statute to codify the specific holding in *Durland* regarding past or present acts [Act of Mar. 4, 1909, ch. 321, sec. 215, 35 Stat. 1130. *See* S.Doc.No. 68, 57th Cong., 1st Sess., pt. 2, 63-64 (1901)] indicates that Congress did not intend that the executive branch of government use the mail fraud statute as a basis for federal revision of the common law of crimes. The presumption that Congress operates within the commonly accepted definition of legal concepts remains as true today with respect to the mail fraud statute as it was before the *Durland* decision.

The mail fraud statute, as interpreted by this Court in *McNally v. United States*, 483 U.S. 350, 358-60 (1987), and *Carpenter v. United States*, 484 U.S. 19, 27 (1987), applies only to those deceptions involving the "property of another." This term – property of *another* – excludes jointly owned property such as partnership property. *See* Petition for a Writ of Certiorari at 16, n.12. Without any showing of congressional intent, the government has

redefined fraud under the mail fraud statute to apply here, despite the fact that the "property of another" was not involved in the disputed transaction.[1]

3. The government incorrectly asserts that, "Petitioner also challenges the sufficiency of the evidence that the mailings were in furtherance of his fraudulent scheme." Petitioner does not challenge the sufficiency of the evidence. The only evidence regarding how the mailings were related to the alleged "scheme to defraud" was from the government's lead witness who testified that Petitioner's ability to obtain partnership funds was NOT dependent on the routine mailings of invoices and checks relied upon by the government for jurisdiction. *See* Petition for a Writ of Certiorari at 5. Yet the government continues to misstate the evidence by arguing to the contrary: "The ongoing success of that scheme depended on petitioner's replenishing with additional partnership revenues the partnership funds he diverted to HGA Associates." Brief for the United States at 8. The sufficiency of the evidence is not the issue. The issue is the failure of the Fourth Circuit Court of Appeals to address and apply dispositive decisions by this Court, namely *United States v. Maze*, 414 U.S. 395 (1974), *Parr v. United States*, 363 U.S. 370 (1960), and *Kann v. United States*, 323 U.S. 88 (1944), all of which support the proposition that mailings of routine business invoices and checks upon

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[1] Any doubt about Congressional intent in this regard should have been removed when the mail fraud statute was amended in 1988 to incorporate the term "another," the same limiting phrase interpreted in state criminal statutes to exclude jointly owned property.

which the alleged "scheme to defraud" is not dependent cannot support federal jurisdiction.

4. Nothing in the government's brief refutes this simple point: the current case provides an ideal vehicle for this Court to make a definitive statement about the power of the Executive Branch to interpret and expand the scope of federal criminal laws. If federal criminal laws are to be defined by Congress and not by prosecutorial initiatives, then the present case provides an excellent opportunity to establish that principle.

CONCLUSION

For the foregoing reasons, Petitioner respectfully requests that this Court grant his Petition for a Writ of Certiorari.

Date: November 9, 1992

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